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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 456

GULF STEVEDORE CORPORATION AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION,

Petitioners,

v.

LEE H. HOLLIS, DEPUTY COMMISSIONER OF LABOR, AND GABELUS PICARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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July 24, 1970

FIDELITY PRINTING COMPANY, INC., HOUSTON

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GULF STEVEDORE CORPORATION AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION,

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LEE H. HOLLIS, DEPUTY COMMISSIONER OF LABOR, AND GABELUS PICARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on May 5, 1970.

OPINIONS BELOW

The compensation order issued under the Longshoremen's and Harbor Workers' Compensation Act by Lee H. Hollis, Deputy Commissioner, Bureau of Employees' Compensation, Eighth Compensation District, is unreported, but is printed in Appendix B to this petition, *infra*, page 2a. The memorandum and order of the United States Dis-

trict Court for the Southern District of Texas, Houston Division, is reported at 298 F.Supp. 426 and is printed in Appendix C, *infra*, page 7a. The opinion of the United States Court of Appeals for the Fifth Circuit is unreported, but is printed in Appendix D, *infra*, page 17a.

JURISDICTION

The judgment sought to be reviewed from the United States Court of Appeals for the Fifth Circuit was entered on May 5, 1970, *infra*, Appendix E, page 19a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A., Sec. 1254(1).

QUESTION PRESENTED

Whether loss of vision should be measured under the Longshoremen's and Harbor Workers' Compensation Act with consideration for the corrective medical benefits of contact lenses.

STATUTORY PROVISIONS INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C.A., Sections 907(a), 908(c)(5), and 908(c)(16) (Appendix A, *infra*, page 1a).

STATEMENT OF THE CASE

This case involves an appeal from an award of compensation for the permanent loss of use of an eye made by the Deputy Commissioner administering the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 901, et seq.

The basic facts are not in dispute. Claimant Gabelus Pillard was struck in his right eye by a rope while working as a longshoreman for Gulf Stevedore Corporation. As a result of the injury, a traumatic cataract developed in

Picard's right eye and the cataract was surgically removed. The cataract removal resulted in a 95 percent temporary loss of visual acuity in the eye. A replacement lens, however, usually restores normal usable vision to the eye. Following a successful operation, the claimant accidentally struck himself in the eye, causing vitreous clouding and delay in recovery. Had Picard not struck himself in the eye, he could have been restored to corrected vision of 20/20 before the Deputy Commissioner's hearing. The treating physician testified that the vitreous will clear, either spontaneously or by surgery. When the vitreous clears, a contact lens will be used and complete vision restored.

The petitioners requested the Deputy Commissioner not to proceed with the hearing on permanent loss of vision, but to continue the case so that an accurate medical appraisal of the restored usefulness of the right eye could be made. The Deputy Commissioner took the view that the employee was entitled to a scheduled award for permanent loss of vision in the right eye based upon vision remaining without a corrective lens, and in effect held that the restoration of vision by the use of a contact lens was immaterial for compensation purposes. The Deputy Commissioner proceeded with the hearing, found that the claimant for compensation purposes had permanently lost the use of the right eye, and made the corresponding award.

Petitioners perfected their appeal to the United States District Court, urging that the Deputy Commissioner is required to consider the benefits of corrective medical treatment in determining permanent loss of vision for statutory purposes, and, therefore, should have delayed the hearing until an accurate appraisal could be made of the benefit of a corrective lens. The District Court sustained the Deputy Commissioner's award.

Petitioners perfected their appeal to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals entered judgment on May 5, 1970, affirming the District Court. The Court of Appeals held that uncorrected vision is the proper standard for determining loss of vision under the Longshoremen's and Harbor Workers' Compensation Act.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. The decision below is in direct conflict with the decision of the United States Court of Appeals for the District of Columbia on the proper interpretation of the Longshoremen's and Harbor Workers' Compensation Act.

The Court of Appeals for the District of Columbia in *Washington Terminal Co.* v. *Hoage*, 79 F.2d 158 (D.C. Cir. 1935), decided the identical question which was before the Fifth Circuit. In *Hoage*, the Court of Appeals held that the Deputy Commissioner erred in not considering the assistance of glasses in passing upon the extent of the claimant's vision loss. The court felt that the use of eye glasses as an aid to vision was "so commonly understood and employed" that it should be considered in determining subsection 908(c)(16) vision loss (79 F.2d at 161). The court below has held that no consideration should be given to corrective lens in measuring vision loss under the same statutory provision (Appendix D, p. 17a).

The Hoage decision is in accord with the New York decisions under the New York Compensation Law. The pre-Longshoremen's Act New York decisions uniformly interpret the loss of vision provision as requiring a consideration of corrective vision. *Bochecchio* v. *Charnin Contracting Co.*, 209 App. Div. 619, 205 N.Y.S. 350 (1924); *McNamara* v. *McHarg-Barton Co.*, 200 App. Div. 188, 192

N.Y.S. 743 (1922); *Cortina* v. *Lathrop & Shea Co.*, 191 App. Div. 928, 180 N.Y.S. 855 (1920); *Valentine* v. *Sherwood Metal Working Co.*, 189 App. Div. 410, 178 N.Y.S. 494 (1919); *Frings* v. *Pierce-Arrow Motor Car Co.*, 182 App. Div. 445, 169 N.Y.S. 309 (1918). In interpreting the Longshoremen's Act, substantial weight is given to the settled construction of the New York Compensation Law prior to the adoption by Congress of the Longshoremen's Act since the Longshoremen's Act was modeled after the New York Statute. H. R. Rep. No. 1190, 69th Cong., 1st Sess. 2 (1926); *Lawson* v. *Suwannee Food and Steamship Co.*, 336 U.S. 198, 205 (1949); *Case* v. *Pillsbury*, 148 F.2d 392 (9th Cir. 1945); *Employer's Liability Assur. Corp.* v. *Monahan*, 54 F.2d 130 (1st Cir. 1937); *Bethlehem Ship Building Corp.* v. *Monahan*, 54 F.2d 349, 350 (1st Cir. 1931); *Texas Employers' Insurance Association* v. *Shed*, 410 F.2d 56, 70 (5th Cir. 1969).

2. The nonrecognition of corrective devices will undermine a major purpose of an important Federal Statute.

The Longshoremen's and Harbor Workers' Act is an important statute which should be carefully and uniformly interpreted. *Czaplicki* v. *The Heogh Silvercloud*, 351 U.S. 525 (1956).

As the district court stated (Appendix C, p. 13a), the statute is to be liberally construed so as to insure proper compensation. It should not, however, be construed to work undue hardship on an employer. *Reed* v. *SS YAKA*, 373 U.S. 410 (1963); *Voris* v. *Eikel*, 396 U.S. 328 (1953). Under Section 907(a) of the Act, the employer "must furnish such medical treatment as the nature of the injury or the process of recovery may require." Requiring the employer to pay compensation for permanent loss of vision while simultaneously paying for restoration of vision, such as through medical corrective lenses, seems unfair. The Act

must be interpreted and enforced so as to avoid such unfairness. *Pacific S.S. Co. v. Pillsbury*, 52 F.2d 686, 788 (S.D. Cal. 1931), aff'd 56 F.2d 79 (9th Cir 1932).

The Act is designed to encourage prompt aid on the part of an employer. *McCabe Inspection Service, Inc. v. Willard*, 240 F.2d 942 (2d Cir. 1951). An employer may be hesitant to provide immediate corrective medical treatment if the beneficial results of such treatment will not be considered in making compensation awards. Moreover, an award based upon permanent loss of vision and a finding of maximum recovery indicate that the process of recovery has been completed, and that the employer's duty to provide medical treatment is terminated. The claimant often may find a greater compensation in having corrective treatment adequately and fully provided than in receiving the scheduled payment and no further subsidized medical service.

The district court opinion adopted by the Fifth Circuit disregards the basic principles of the Longshoremen's Act, conflicts with the well-reasoned opinion of the Court of Appeals for the District of Columbia, and portends either an inequitable or less effective administration of an important federal statute.

CONCLUSION

For the foregoing reasons it is urged that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

SWEENEY J. DOEHRING
ED BLUESTEIN, JR.
Counsel for Petitioners

Of Counsel:
FULBRIGHT, CROOKER, FREEMAN,
BATES & JAWORSKI

July 24, 1970

APPENDIX A

STATUTORY PROVISIONS

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

(33 U.S.C.A. Secs. 901, et seq.)

Sec. 907. Medical services and supplies

(a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

Sec. 908. Compensation for disability

Compensation for disability shall be paid to the employee as follows:

* * *

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:

* * *

(5) Eye lost, one hundred and sixty weeks' compensation.

* * *

(16) Binocular vision or per centum of vision: Compensation for loss of binocular vision or for 80 per centum or more of the vision of any eye shall be the same as for loss of the eye.

APPENDIX B

UNITED STATES DEPARTMENT OF LABOR

BUREAU OF EMPLOYEES' COMPENSATION
EIGHTH COMPENSATION DISTRICT

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act	
GABELUS PICARD, *Claimant*, v. GULF STEVEDORE CORPORATION, *Employer*, TEXAS EMPLOYERS' INSURANCE ASSOCIATION, *Insurance Carrier*.	CASE NO. 3269-1423 (Filed: Oct. 28, 1968)

COMPENSATION ORDER
AWARD OF COMPENSATION

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and

A hearing having been duly held in conformity with the law,

The Deputy Commissioner makes the following

FINDINGS OF FACT

1. That on September 21, 1964 Gabelus Picard, hereinafter referred to as the "employee" or the "claimant" was in the employ of the Gulf Stevedore Corporation at Houston, Texas, in the Eighth Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

2. That the liability of the employer for compensation under the said Act was insured by the Texas Employers' Insurance Association.

3. That on said day the employee herein while performing service for the employer as a longshoreman aboard the vessel "Panaghia Theospepasti", afloat upon the navigable waters of the United States and moored at City Dock No. 15, Houston, Texas, sustained personal injury resulting in disability when while removing beams, the hold rope on the beam bridle hit the employee on the right eye, causing (1) contusion angle glaucoma, (2) traumatic irritis, and (3) vitreous and subretinal hemorrhage in the right eye.

4. That the injury arose out of and in the course of the employment;

5. That notice of the injury was not given the employer within thirty days, that the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice;

6. That the employer furnished the claimant with medical treatment, etc., in accordance with the provisions of Section 7(a) of the Act;

7. That the average weekly earnings of the employee at the time of the injury were $128.21.

8. That as a result of the injury the claimant was wholly disabled from September 22, 1964 to November 19, 1964 inclusive and for such temporary total disability he is entitled to 8-3/7 weeks compensation in the amount of $590.00; that the claimant was temporarily and partially disabled from November 20, 1964 to December 10, 1964, a period of 3 weeks and for such temporary partial disability he is entitled to 3 weeks compensation at various rates in the amount of $106.41; that he was again wholly disabled from December 11, 1964 to February 11, 1968, inclusive (less 140-3/7 weeks worked) and for such temporary total

disability he is entitled to 25 weeks compensation in the amount of $1,750.00 for a total amount of compensation for such temporary total and temporary partial disability of $2,446.41.

9. That the employer and the insurance carrier have paid to the claimant $2,516.41 as compensation.

10. That the employee claims that the injury caused permanent loss of binocular vision of 80 per centum or more of his right eye for which he applied for a scheduled award of compensation pursuant to Section 8(c) of the Act;

11. That at the request of the claimant, a hearing was held by the Deputy Commissioner on May 29, 1968, to resolve the issues of whether maximum improvement for the purpose of determining a scheduled award had been obtained; whether the injury caused permanent loss of use of the employee's right eye and, if so, the nature and degree thereof.

12. That at such hearing the Deputy Commissioner received medical testimony of a physician who is a Board-certified ophthalmologist and who was the claimant's attending physician.

13. That the physician, Dr. Conrad D. Moore, had examined the claimant on October 8, 1964 and concluded that the claimant had a contusion angle glaucoma, traumatic irritis and vitreous and retinal hemorrhages of the right eye residual of the injury.

14. Subsequently the claimant developed a cataract which caused the need for surgical removal of the cataract and the lens of the claimant's right eye on August 22, 1967 at Methodist Hospital in Houston, Texas.

15. While convalescing in the hospital following the surgery, the condition in his right eye was inadvertently

aggravated causing a clouding of the vitreous. That such clouding may improve.

16. That as a result of the surgical removal of the lens in the employee's right eye he has an approximate 95 per centum loss of clear visual acuity without a prosthesis.

17. As a result of the uncorrected visual loss in the right eye he is industrially blind in that eye.

18. The uncorrected visual loss will not improve and for the purpose of determining the scheduled award for permanent total disability of the right eye maximum improvement was achieved on February 12, 1968.

19. Considering the language of the statute the employee is entitled to a scheduled award for loss of vision in his right eye on the basis of vision remaining without a corrective lens.

20. As a further result of the injury the claimant has a permanent disability equivalent to loss of useful industrial vision of his right eye for which he is entitled to compensation for 160 weeks (100 percent of 160 weeks) at $70.00 per week, in the amount of $11,200.00.

21. The claimant is entitled to continuing medical treatment to his right eye for such period as the nature of the injury or the process of recovery may require, including reimbusement for reasonable transportation expenses necessary to procure such medical treatment.

22. Accrued compensation for temporary total, temporary partial and permanent partial disability to include June 23 amounts to $3,776.41. The employer and the insurance carrier have paid $2,516.41.

Upon the foregoing findings of fact the Deputy Commissioner makes the following

AWARD

The employer, the Gulf Stevedore Corporation, and the insurance carrier, the Texas Employers' Insurance Association, shall pay to the claimant compensation as follows: For temporary total disability from September 22, 1964 to November 19, 1964, inclusive, 8-3/7 weeks at $70.00 per week, $590.00; and for temporary partial disability from November 20, 1964 to December 10, 1964, a period of 3 weeks at various rates in the amount of $106.41, and for temporary total disability from December 11, 1965 to February 11, 1968 (less 140-3/7 weeks worked) 25 weeks at $70.00 per week in the amount of $1,750.00, and for permanent total disability of the right eye from February 12, 1968, to June 23, 1968, 19 weeks at $70.00 per week, in the amount of $1,330.00, or a total amount of $3,776.41.

The employer and the insurance carrier having paid $2,516.41 to the claimant as compensation shall pay forthwith $1,260.00. Subsequent to June 24 they shall continue to pay compensation in bi-weekly installments at $70.00 per week until the full amount of $11,200.00 shall have been paid for permanent total disability of the right eye.

An attorney's fee of $1,077.14 is approved in favor of Mandell and Wright, Attorneys, for services rendered on behalf of the claimant ($577.14 of which is for examination, report and consultation and testimony of Dr. Conrad D. Moore, examination by Dr. Ray K. Dailey, and for photostats of medical evidence), such sum to be a lien upon and be paid out of this award to the claimant's attorneys.

Given under my hand and filed at Galveston, Texas, this 24th day of June, 1968.

LEE H. HOLLIS
Deputy Commissioner
Eighth Compensation District

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GULF STEVEDORE CORPORATION AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION

v.

LEE H. HOLLIS, DEPUTY COMMISSIONER, AND GABELUS PICARD

Civil Action No. 68-H-558

MEMORANDUM AND ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT OF THE DEPUTY COMMISSIONER AND CLAIMANT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This is an appeal by plaintiffs, Gulf Stevedore Corporation and Texas Employers' Insurance Association, seeking reversal of a compensation order awarding disability benefits to Gabelus Picard (claimant) for the loss of his right eye. The cause arisis upon a complaint to review and set aside as not in accordance with law the compensation order filed by the defendant deputy commissioner on June 24, 1968, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C. §§ 901 et seq. (1957).

Defendant deputy commissioner counterclaims for a declaratory judgment that the compensation order of June 24, 1968 is in all respects in accordance with law and fully supported by evidence, and that plaintiffs are liable to claimant Picard for the amounts specified in the compen-

sation order, together with twenty per cent additional compensation under 33 U.S.C. § 914(f), for delayed payment. The deputy commissioner further seeks judgment awarding a mandatory injunction against plaintiffs, enjoining upon them full compliance with the compensation order and with 33 U.S.C. § 914(f). This cause is now before the Court on cross motions for summary judgment filed by plaintiffs, the deputy commissioner, and claimant.

Claimant was employed by plaintiff, Gulf Stevedore Corporation, as a longshoreman. He was working aboard the S.S. PANAGHIA THEOSKEPASTI, which was moored in the navigable waters of the Houston Ship Channel. Claimant was struck in the eye by a rope. As a result of this accident claimant's right eye was injured.

On May 29, 1968, a formal hearing was held before the deputy commissioner to determine the compensation due Picard under the Longshoremen's and Harbor Workers' Compansation Act. The deputy commissioner, based upon the record made before him at the hearing, found that as the result of an employment injury to the right eye on September 21, 1964, claimant was entitled to benefits for temporary total disability from September 22, 1964, to November 19, 1964; for temporary partial disability from November 20, 1964, to December 10, 1964; and for recurrent periods of temporary total disability from December 11, 1964, to February 11, 1968 (less 140-3/7 weeks worked). Additionally, the deputy commissioner found that maximum improvements of the condition of claimant's right eye was reached on February 12, 1968, and, based upon a finding that claimant has a permanent loss of vision of approximately 95 per cent, without correction, in that eye, the deputy commissioner awarded claimant compensation for that scheduled loss amounting to 160 weeks as provided in

section 8(c)(5) and section 8(c)(16) of the Longshoremen's Act, 33 U.S.C. §§ 908(c)(5) and (16) (1957).[1]

Plaintiff does not challenge the deputy commissioner's findings of temporary total disability (September 22, 1964 to November 19, 1964); temporary partial disability (November 20, 1964 to December 10, 1964); or of recurrent periods of temporary total disability (December 11, 1964 to February 11, 1968). What plaintiff does challenge is the deputy commissioner's determination that claimant has suffered a scheduled loss under section 8(c)(5) and 8(c)(16). Specifically plaintiff complains that the deputy commissioner did not apply the proper legal standard for determining disability to the eye in that he refused to consider corrected vision. Plaintiff further complains that the evidence does not support the finding that claimant's right eye reached maximum improvement on February 12, 1968, since the only doctor who testified was still treating claimant on that date and was hopeful of and expected continued improvement of corrected vision, and since the order itself noted that Picard's condition may improve (Finding No. 15).

If the deputy commissioner's view of the law is the correct one, and he need not consider corrected vision, then his finding are supported by substantial evidence in the record.[2] The instant record discloses that the only medical

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[1] Findings of Fact Nos. 18 and 19 of the order were as follows:

"18. The uncorrected visual loss will not improve and for the purpose of determining the scheduled award for permanent total disability of the right eye maximum improvement was achieved on February 12, 1968.

19. Considering the language of the statute the employee is entitled to a scheduled award for loss of vision in his right eye on the basis of vision remaining without a corrective lens."

[2] The substantial evidence rule governs the Court's review of any factual determination made by the deputy commissioner. *See O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *O'Keeffe* v. *Smith, Hinchman & Grylls*, 380 U.S. 359 (1965).

evidence presented to the deputy commissioner was the testimony of Dr. Conrad D. Moore, a Board-certified Ophthalmologist (Tr. 35) who had treated claimant on behalf of the plaintiff insurance carrier (Tr. 37). Dr. Moore testified that as a result of this injury claimant had contusion angle glaucoma, traumatic iritis, and vitreous and subretinal hemorrhage in the eye; a cataract developed in claimant's eye requiring surgery for its removal; this surgery also involved the removal of the lens from claimant's right eye. (Tr. 43) As a result of the removal of the lens claimant suffered the loss of ninety-five per cent of visual acuity in his right eye. (Tr. 45) The doctor further testified that claimant's eyesight might be restored to normal with the use of a "cataract lens." (Tr. 45) Assuming that the deputy commissioner is not required to consider corrected vision, the testimony supports his finding that claimant suffered a scheduled loss. In addition, the deputy commissioner is justified in determining that claimant's eye had reached maximum improvement on February 12, 1968. Even though there is testimony that claimant was recovering from a postoperative injury, it is clear that without corrective lenses, claimant's visual acuity in the right eye could never exceed five per cent. Therefore, regardless of the status of the postoperative injury at the time of the hearing, claimant would be entitled to compensation for a scheduled loss under section 8(c).

Section 8(c) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 908(c)) provides:

> "(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition to compensation for temporary disability or temporary partial disability paid in accordance with subdivision (b)

or subdivision (e) of this section respectively, and shall be paid to the employee, as follows:

* * *

"(5) Eye lost, one hundred and sixty weeks' compensation.

* * *

"(16) Binocular vision or percentum of vision: Compensation for loss of binocular vision or for 80 per centum or more of the vision of an eye shall be the same as loss of the eye.

* * *

"(21) Other cases: In all other cases in this class of disability the compensation shall be 66⅔ percentum of the difference between his average weekly wages and his wage earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest."

The initial question the Court must resolve is whether the deputy commissioner's order is in accordance with law. In making an award for a scheduled loss under section 8(c)(16) must the deputy commissioner consider corrective lenses? In support of its contention that the question of corrected vision should be resolved affirmatively, plaintiff relies heavily on the case of Washington Terminal Co. v. Hoage, 79 F.2d 158 (D.C. Cir. 1935)[3] The Court in

[3] Plaintiff also relies on some vintage New York cases. *Bochecchio* v. *Charnin Contracting Co.*, 205 N.Y.S. 350 (1924); *McNamara* v. *McHarg-Barton Co.*, 192 N.Y.S. 743 (1922); *Cortina* v. *Lathrop & Shea Co.*, 180 N.Y.S. 855 (1920); *Valentine* v. *Sherwood Metal Working Co.*, 178 N.Y.S. 494 (1919); *Frings* v. *Pierce Arrow Motor Car Co.*, 169 N.Y.S. 309 (1918). The Longshoremen's Act was modeled after the New York statute. *See Case* v. *Pillsbury*, 148 F.2d 392 (9th Cir. 1945).

Admittedly, state decisions are in conflict on the corrective lens point. Much of the conflict, however, can be explained in terms of the variations in state legislation dealing with the matter. *See* Annot., 142 A.L.R. 822 (1943).

Hoage held that the assistance of glasses should be considered in determining the extent of the loss of vision. The Court said:

> "The use of eyeglasses as an aid to vision is so commonly understood and employed that no person would be considered as having lost 80 per cent. of his vision if at the same time by the use of glasses he would possess 50 per cent. of normal vision. Therefore, according to the reasonable construction of the statute, it should be held that one possessing 50 per cent. efficiency of vision in an injured eye when using glasses cannot be classified as having lost the use of 80 per cent. of the vision of such eye.
>
> "It must be remembered that the award payable to the employee under the statute is for 'disability' which means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. . . . The intention of the law is to provide compensation for loss or disability in earning power and not indemnity or damages for injury to a member of the body. It is consistent with the purpose of that act that the disability of an employee resulting from an injury to his eyes should be considered with reference to the benefit resulting from the use of glasses." *Washington Terminal Co.* v. *Hoage*, *supra* at 161.

Hoage is the only decision of a federal court dealing with the question of corrective lenses.[4]

The deputy commissioner, and claimant of course, contend that corrective lenses need not be considered. They contend that *Hoage* is erroneous when it assumes that "the intention of the law is to provide compensation for loss or disability in earning power and not indemnify or damages

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[4] Actually *Hoage* was construing the District of Columbia Workmen's Compensation statute. However, the Longshoremen's Act is the District of Columbia's compensation statute.

for injury to a member of the body."[5] Section 8(c)(5) of the Longshoremen's Act provides that an employee who has lost an eye will be paid 160 weeks' compensation. Compensation is not tied to lost earning capacity. If a workman suffers a loss covered under the "schedule" of specific injuries, then he is to be paid the disability compensation provided for that loss. This is also true of other scheduled losses such as losses of arms, legs, feet, and hands.

Thus, when the scheduled losses are considered, the rationale of *Hoage* is undermined. If lost earning capacity is the only focus of the Act, corrective lenses should be considered, for their use is likely to enhance the claimant's earning capacity. Under a scheduled loss, however, there is a fixed measure of compensation. The award is not governed by earning capacity: In fact, "the Congress has determined that a loss of wage-earning capacity and its extent are conclusively established when one of the enumerated physical impairments is proven to have arisen out of the employment." *Travelers Insurance Company* v. *Cardillo*, 225 F.2d 137, 144 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). Thus, in effect, the claimant is being compensated for loss of the body member, not lost earning capacity. From this perspective, a consideration of corrective lenses would seem to be irrelevant.

The Court is convinced that there is merit to the deputy commissioner's contentions. In addition, to follow *Hoage* would be to ignore the usually liberal construction placed on the Longshoremen's Act. *See Voris* v. *Eikel*, 346 U.S. 328 (1953). Section 8(c)(16) provides: "Binocular vision or per centum of vision: Compensation for loss of binocular vision or 80 percentum or more of the vision of an eye

[5] In most instances the Act is concerned with lost earning capacity. Certainly this is the measure by which an award is determined under section 8(c)(21) (quoted in text).

shall be the same as for loss of the eye." The language of the statute is clear. In the present case claimant has lost ninety-five per cent of the vision of his right eye. He has suffered a loss under the plain meaning of section 8(c)(16). The statute makes no reference to corrective lenses. To imply the requirement that claimant's injury qualify as a "loss" only if the required percentage of impairment cannot be corrected with lenses, is contrary to the liberality with which the Longshoreman's Act is usually construed. The deputy commissioner's order is in accordance with law and should not be set aside.

Having resolved the question of corrective lenses, the Court must now turn to a consideration of the deputy commissioner's counterclaim. The deputy commissioner seeks a mandatory injunction against plaintiffs enjoining upon them full compliance with the compensation order. Section 21(c), 33 U.S.C. § 921(c), provides in part:

> "If any employer or his officers or agents fail to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order. . . ."

With respect to the finality of orders section 21(a), 33 U.S.C. § 921(a), provides:

> "A compensation order shall become effective when filed in the office of the deputy commissioner . . . and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subsection (b) of this section, shall become final at the expiration of the thirtieth day thereafter."

Since this action was instituted within thirty days after the compensation order, that order has not become final and the Court has no jurisdiction to enforce it. The Court in

Harris v. *Briscoe*, 212 F.2d 619 (D.C. Cir. 1954) spoke to this point, saying:

> "Although it 'requires' payment, the Deputy Commissioner's award, standing alone, has no coercive effect. And in a review proceeding under § 21(b) the District Court cannot coerce payment of accrued installments, either *pendente lite* or *in a final judgment affirming the award*. By express provision of the Act, the only methods of enforcement available to a beneficiary are those set out in § 21(c) and § 18, each of which requires a new proceeding in the District Court, *separate and distinct* from that in which the award is reviewed under § 21(b)." *Id.* at 621. (Emphasis added).

In his counterclaim the deputy commissioner also seeks to assess a delay penalty against plaintiffs under section 14(f), 33 U.S. C. § 14(f) (1957). Section 14(f) provides:

> "(f) If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation, an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 921 of this title and an interlocutory injunction staying payment is allowed by the court as provided therein."

The cases cited by the deputy commissioner to support his claim for assessment of the delay penalty are inapposite. These are all cases where the employer had not procured an interlocutory injunction within the ten day period. See *Zeller* v. *Associated Indemnity Corp.*, 92 F. 2d 453 (9th Cir. 1937); *Arrow Stevedore Corp.* v. *Pillsbury*, 88 F.2d 446 (9th Cir. 1937); *Canado Stevedoring Corp.* v. *Lowe*, 85 F.2d 119 (2d Cir.), *cert. denied*, 299 U.S. 488 (1936); *Twine* v. *Locke*, 68 F.2d 712 (2d Cir. 1934). In the present case, however, plaintiffs obtained an order staying payment of

the lump sum portion of the award within ten days of the date of the compensation order. The lump sum award was for the permanent partial disability under section 8(c)(16). The deputy commissioner makes no allegation that plaintiffs have failed to pay the weekly compensation payments required by the order. Under these circumstances, the deputy commissioner's counterclaim for assessment of the delay penalty must be denied.

In sum, the Court determines that the deputy commissioner's order is in accord with law. The Court shall dissolve its prior ruling granting plaintiff a stay in complying with the order of the deputy commissioner. The Court, however, refuses to issue a mandatory injunction or assess a delay penalty under section 14(f).

Therefore, for the above reasons, it is ORDERED, ADJUDGED, AND DECREED that the motions for summary judgment of the deputy commissioner and of the claimant be, and they are hereby, granted. Plaintiff's motion for summary judgment is denied.

The Clerk will notify the United States Attorney to draft an appropriate judgment in accordance with this Memorandum and Order for submission to the Court by April 7, 1969, after first obtaining approval of opposing counsel and counsel for claimant.

DONE at Houston, Texas, this 19th day of March, 1969.

John V. Singleton, Jr.
United States District Judge

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28010

GULF STEVEDORE CORPORATION AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Plaintiffs-Appellants,

v.

LEE H. HOLLIS, DEPUTY COMMISSIONER AND GABELUS PICARD,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

(May 5, 1970)

Before TUTTLE, WISDOM, and GOLDBERG, Circuit Judges.

PER CURIAM: Gabelus Picard was working as a longshoreman for Gulf Stevedore on a vessel in Houston when a rope struck him in the eye. The only issue on this appeal is the proper standard for determining the percentage loss of vision. The Longshoreman's Act provides that compensation for loss of eighty percent or more of the vision of an eye "shall be the same as for loss of the eye"—160 weeks' compensation. 33 U.S.C. § 908(c)(5), (16).

Picard and the deputy commissioner contend that Picard qualifies under this section because his uncorrected vision suffered a permanent loss of ninety-five percent. Gulf Stevedore Corporation and Texas Employers' Insurance Association contend that because a cataract lens could correct vision to loss of less than eighty percent with possible future improvement, Picard should not qualify. The district court confirmed the deputy commissioner's order awarding Picard compensation for loss of the eye.

Like the district court below we conclude that uncorrected vision is the proper standard under the Act. We adopt the reasoning and conclusions of the district court set forth at *Gulf Stevedore Corp.* v. *Hollis*, S.D. Tex. 1969, 298 F. Supp. 426.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1969

No. 28010

D. C. Docket No. CA 68-H-558

GULF STEVEDORE CORPORATION AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Plaintiffs-Appellants,

v.

LEE H. HOLLIS, DEPUTY COMMISSIONER AND GABELUS PICARD,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before TUTTLE, WISDOM and GOLDBERG, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

May 5, 1970

Issued as Mandate: May 27, 1970

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 456

GULF STEVEDORE CORPORATION AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

LEE H. HOLLIS, DEPUTY COMMISSIONER OF LABOR, AND GABELUS PICARD,
Respondents

REPLY TO PETITION FOR A WRIT OF CERTIORARI

MANDELL & WRIGHT
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO._____

GULF STEVEDORE CORPORATION AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION,

Petitioners

v.

LEE H. HOLLIS, DEPUTY COMMISSIONER OF LABOR, AND GABELUS PICARD,

Respondents

REPLY TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Our only relevant disagreement with Petitioner's Statement of the Case is that it ignores the testimony of the

physician, alluded to by the District Court, that the contact lens is recognized as a prosthesis. Thus, such restoration of vision as may be accomplished by usage of the contact lens is "artificial" rather than "natural."

REPLY TO PETITIONER'S REASONS FOR GRANTING THE WRIT

A. As was ably demonstrated by the District Judge, *Washington Terminal Co. v. Hoage,* 79 F.2d 158 (D.C. Cir. 1935), was decided under an erroneous premise. See *Gulf Stevedore Corp. v. Hollis,* 298 F. Supp. 426, 430-31 (S.D. Tex. 1969). The present decision is correct.

B. Petitioner urges that it will not provide the prosthesis unless the Court agrees to diminish the related incapacity. Thus, it would deny medical care in the form of artificial lens, hearing aids or plastic limbs to those maimed in the industry. We respectfully contend that this argument has no foundation under the Longshore Act. §907, 33 U.S.C.A., provides:

> "(a) The employer shall furnish such medical, surgical and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require."

The mandatory language clearly contemplates something more than just stopping the bleeding. The Petitioner's point is without merit.

CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

MANDELL & WRIGHT

By_____

Attorneys for Gabelus Picard, Respondent
1901 First National Life Bldg.
Houston, Texas 77002

CERTIFICATE OF SERVICE

This is to certify that on the 21st day of August, 1970, two copies of the foregoing were served on Mr. Ed Bluestein, Jr., of Fulbright, Crooker, Freeman, Bates & Jaworski, Bank of the Southwest Building, Houston, Texas, Attorney for Petitioners, and on Mr. Morton Hollander and Mr. Leavenworth Colby, Attorneys, U. S. Department of Justice, Washington, D.C., Attorneys for Lee H. Hollis, Deputy Commissioner, by placing the same in properly addressed and stamped envelopes and depositing in the United States mail.

_____

Sidney Ravkind

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 440

GULF STEVEDORE CORPORATION AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION, PETITIONERS

v.

LOUIS HOLLAND, DEPUTY COMMISSIONER OF LABOR, AND [illegible], RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 456

GULF STEVEDORE CORPORATION AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION, PETITIONERS

v.

LEE H. HOLLIS, DEPUTY COMMISSIONER OF LABOR, AND GABELUS PICARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT DEPUTY COMMISSIONER IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19a–20a) is unreported; the opinion of the district court (Pet. App. 7a–16a) is reported at 298 F. Supp. 426.

JURISDICTION

The judgment of the court of appeals was entered May 5, 1970. The petition for a writ of certiorari was filed on July 27, 1970. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the effect of use of prosthetic devices should be taken into account in determining whether there has been loss of use of a bodily member under the schedule disability sections of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 908(c)(1)–(19).

STATUTORY PROVISIONS

The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. 901 *et seq.*, provides in pertinent part:

> § 907. Medical services and supplies.
>
> (a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.
>
> (b) * * * The deputy commissioner shall have authority to determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished and shall have authority to order a change of physicians or hospitals when in his judgment such change is desirable or necessary.
>
> * * * * *
>
> (d) If the employer fails to provide the medical or other treatment, services, and supplies required to be furnished by subsection (a) of this section, after request by the injured employee, * * * such injured employee may procure such medical or other treatment, services, and supplies and select a physician to render

treatment and services at the expense of the employer. * * * The deputy commissioner may, * * * upon application by a party in interest, make an award for the reasonable value of such medical or surgical treatment so obtained by the employee. * * *

§ 908. Compensation for disability.

Compensation for disability shall be paid to the employee as follows:

(a) Permanent total disability: In case of total disability adjudged to be permanent 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

(b) Temporary total disability: In case of disability total in character but temporary in quality 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:

* * * * *

(5) Eye lost, one hundred and sixty weeks' compensation.

* * * * *

(16) Binocular vision or per centum of vision: Compensation for loss of binocular vision or for 80 percent or more of the vision of an eye shall be the same as for loss of the eye.

* * * * *

(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

* * * * *

(21) Other cases: In all other cases in this class of disability the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest.

* * * * *

(e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another em-

ployment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

STATEMENT

Gabelus Picard sustained an injury to his right eye while employed by Gulf Stevedore Corp. as a longshoreman aboard a vessel moored in the navigable waters of the Houston Ship Channel. The lens of the eye had to be surgically removed, resulting in a 95 per cent uncorrected permanent visual loss. A deputy commissioner of labor ruled that Picard was entitled under the Act to the schedule award of 160 weeks compensation for the physical loss of over 80 per cent of the vision of an eye. 33 U.S.C. 908 (c)(5), (16). In addition to this award, the deputy commissioner awarded Picard benefits, not contested by petitioners, for temporary total disability (33 U.S.C. 908(b)), from September 22, 1964 to November 19, 1964, and from December 11, 1964 to February 11, 1968, less 140 3/7 weeks for time actually worked, and for temporary partial disability (33 U.S.C. 908(e)) from November 20, 1964 to December 10, 1964 (Pet. App. 6a).

Gulf Stevedore Corp., and the Texas Employers' Insurance Association, the compensation insurer, brought an action in the district court seeking reversal of the 160 weeks' compensation award for loss of vision in the right eye on the ground that the deputy commissioner should have considered the effect of use of a prosthesis (a cataract lens) in determining the degree to which Picard had lost the use of that eye.

Both the district court and the court of appeals rejected that argument and held that a claimant's uncorrected vision is the proper standard to be applied in determining the percentage loss of vision for an award under 33 U.S.C. 908(c) (5), (16).

ARGUMENT

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, provides two separate types of compensation awards for permanent partial disability. 33 U.S.C. 908(c) (1) through (19) provide schedule awards for permanent partial disability resulting from physical loss or loss of use of a bodily member. Section 908(c) (1)–(19) establishes a schedule of awards, the amounts of which are fixed by Congress at a certain number of weeks compensation without regard to economic loss. Section 908(c)(21) provides for calculation of awards for permanent partial disability in all other cases on the basis of the claimant's actual economic loss of earning power.

The deputy commissioner and the courts below applied this distinction when they considered only uncorrected visual loss in determining that the claimant was entitled to a schedule award for loss of more than 80 per cent of the vision of his right eye. The district court, whose reasoning was adopted by the court of appeals, specifically held:

> If lost earning capacity is the only focus of the Act, corrective lenses should be considered, for their use is likely to enhance the claimant's earning capacity. Under a scheduled

> loss, however, there is a fixed measure of compensation. The award is not governed by earning capacity * * * Thus, in effect, the claimant is being compensated for loss of the body member, not lost earning capacity. From this perspective, a consideration of corrective lenses would seem to be irrelevant. [Pet. App. 13a.]

By refusing to take into account the fact that the claimant's loss of earning capacity would be lessened by the use of corrective lenses, the deputy commissioner and both courts below followed the majority rule of "no reduction" for prosthetic devices. 2 Larson, *Workmen's Compensation* § 58.10. A number of decisions have applied this rule in cases where a cataract or similar injury left the employee with greater than 80 per cent loss of industrial vision in one eye which could be partly restored with a prosthetic device. *E.g.*, *Lindsay* v. *Glennie Industries, Inc.*, 379 Mich. 573, 153 N.W. 2d 642; *Pargas Co.* v. *Hagan*, 428 S.W. 2d 779; *Western Contracting Corp.* v. *Industrial Comm'n*, 15 Utah 2d 208, 390 P. 2d 125; *Great American Indemnity Co.* v. *Industrial Comm'n*, 114 Colo. 91, 162 P. 2d 413; *Otoe Food Products Co.* v. *Cruickshank*, 141 Neb. 298, 3 N.W. 2d 452; *McCullough* v. *Southwestern Bell Tel. Co.*, 155 Kan. 629, 127 P. 2d 467; *Livingston* v. *St. Paul Hydraulic Hoist Co.*, 203 Minn. 62, 279 N.W. 829; *Pocahontas Fuel Co.* v. *Workmen's Comp. Appeal Bd.*, 118 W. Va. 565, 191 S.E. 49; *Marland Refining Co.* v. *Colbaugh* 110 Okla. 238, 238 Pac. 831. Except for the New York cases cited by petitioner, which represent the minority view, partially restored loss of vision has been considered only in cases in-

volving permanent total disability or non-schedule permanent partial disability where actual loss of earning power is at issue. *E.g., Foster* v. *Schmahl*, 197 Minn. 602, 268 N.W. 631; *Owen* v. *Chesapeake Corp.*, 198 Va. 440, 94 S.E. 2d 462; *Kelley* v. *Prouty*, 54 Idaho, 225, 30 P. 2d 769; *Graf* v. *National Steel Products Co.*, 225 Mo. App. 702, 38 S.W. 2d 518, *Alessandro Petrillo Co.* v. *Marioni*, 33 Del 99, 131 A. 164.

In support of their position that the effect of corrective lenses should be considered by the deputy commissioner in schedule as well as non-schedule awards, the petitioners rely principally upon a 1935 decision, *Washington Terminal Co.* v. *Hoage*, 79 F. 2d 158 (C.A.D.C.). The holding in that case that the effect of corrective lenses must be taken into account in determining schedule awards under 33 U.S.C. 908(c)(5), was premised on the belief that schedule awards were intended only to compensate for loss of earning power. 79 F. 2d 161. As we have shown, the majority "no reduction" rule which subsequently has developed recognizes that schedule awards are designed to compensate for loss of the bodily member, *not* for loss of earning power. Whether the Court of Appeals for the District of Columbia, contrary to the majority view, would apply today the same rationale it followed 35 years ago is not known. In the event the issue were again presented to it and it chose to follow its earlier decision, the resulting conflict might warrant review by this Court. At the present time, however, there is no occasion for this Court to consider the matter.

Petitioners assert finally that it is unfair to require the employer to provide both corrective medical treatment and compensation for loss of use of a member, and that the decision below ultimately will deprive claimants of corrective medical benefits and thus undermine the purpose of the Act. They contend that once a permanent partial disability award is made, the process of recovery under Section 907(a) is completed and the employer's obligation to provide medical treatment terminates. If corrective treatment will not ultimately benefit the employer by reducing the amount of the award, they argue, the employer will be reluctant to provide such treatment (Pet. 6).

Their argument ignores the requirement that an employer furnish medical service and supplies not only for the period until recovery is completed but also to the extent that the nature of the injury may require. Thus, the finding that an employee has achieved maximum improvement does not itself relieve the employer of the duty to furnish medical services and supplies. 33 U.S.C. 907(a). If an employer fails to provide such treatment, either before or after maximum recovery is achieved, the employee may obtain necessary treatment himself and the deputy commissioner may make an award for the reasonable value thereof. 33 U.S.C. 907(d). Moreover, the deputy commissioner may at any time determine the necessity, character, and sufficiency of medical treatment being furnished by the employer and order whatever changes he finds necessary or desirable. 33 U.S.C. 907(b). Thus, the decision below will not deprive any claimant of adequate corrective treatment.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
WILLIAM D. RUCKELSHAUS,
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ROBERT V. ZENER,
PATRICIA S. BAPTISTE,
Attorneys.

AUGUST 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970